IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 817 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JYOTI VIRSING @ VISIO - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR KR RAVAL for Appellant(s) : 1,
MR PRADIP D BHATE, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 30/03/2007

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

The appellant came to be charged and tried for the offences punishable under Section 302, 376 and 201 of I.P.C. by City Sessions Court in Sessions Case No.213 of 1993. The Sessions Court, by judgment and order dated 27th July, 1995, convicted the appellant for the offence of murder of Bansilal and sentenced him to undergo imprisonment for life. The appellant was also convicted for the offence of rape of Puniben Khumabhai Muniya, punishable under Section 376 of I.P.C. and sentenced him to undergo R.I. for a period of 5 years and to pay a fine of Rs.1,000/-, in default, to undergo S.I. for two months. The appellant was also convicted under Section 201 of I.P.C. but no separate sentence was awarded. Being aggrieved by the said judgment and order, the present appeal is preferred.

2. The prosecution case, in brief, can be stated thus:

2.1 The appellant was working as a watchman on a construction site at Narol Circle to Sarkhej Road situated near Pirana Tol Naka on Survey No.213. It is the case of the prosecution that one Bansilal Nanuram Makwana was working as a labourer alongwith his wife Munnibai. It is further the case of the prosecution that on or around 20th March, 1993, in the middle of the night, while Munniben and her husband Bansilal were sleeping on the construction site on a heap of sand, the appellant attacked Bansilal with a 'dharia' and caused several injuries on vital parts

of the body. On seeing the attack, Puniben rushed to the only room located there and occupied by the accused, for shelter. It is her version that she saw that the accused, after causing death of her husband, dug a pit and buried the dead body in it and thereafter came to the room and committed rape on her twice and thereafter, the accused locked her in the room and went away. According to the prosecution case, Puniben thereafter pulled out the window sill and escaped. She went to Narol crossroads and then went to her hometown at her parental place in Rajasthan.

2.2 After about 5 days, on 25th March, 1993, at about 10.30 p.m., the owner of the premises where the construction was going on – one Abbasbhai Gulambhai Momin lodged F.I.R. with Vatva Police Station alleging that the accused was working on the site as a watchman and that Bansilal and his wife Munniben were working as labourers and they used to stay in the room located on the site whereas the accused was a bachelor, so he used to sleep outside. It was further alleged that on 23rd March, 1993, his Contractor Ajimbhai met him and informed that on 20th March, 1993, when he sent his truck to unload soil for filling up the land, none of the employees of the first informant were present and that after two rounds, he stopped the work. The first informant, therefore, went to the site to find that neither Jyoti i.e. the appellant nor Bansilal or his wife Munnibai were seen. After two days i.e. on 25th, the

first informant received a telephone from his younger brother Kaasambhai that Kaasambhai was informed by one Imdadali Gulambhai that a dead body is noticed on the construction site in a buried condition. However, the hands and legs of the dead body are visible. The first informant, therefore, went to the site and found that information to be correct. The dead body was exhumed and was found to be of Bansilal Nanubhai Makwana.

2.3 According to the first informant, the appellant and Munnibai had developed illicit relations and had, therefore, committed murder of Bansilal Nanubhai Makwana and have then eloped.

2.4 On basis of the above information, an offence was registered and investigation started. After investigation, the police found that the appellant was responsible for murder of Homo Lakhaji Babariya - husband of Munnibai and also for rape of Munnibai and, therefore, ultimately filed chargesheet only against the accused – appellant in the court of Metropolitan Magistrate, Ahmedabad. The learned Metropolitan Magistrate committed the case to the City Sessions Court as the case was triable exclusively by the Court of Sessions and Sessions Case No.213 of 1993 came to be registered.

2.5 Charge against the appellant was framed at Exh.1 on 8th October, 1993 for the murder of Siska Babariya Muniya - husband of Puniben and for rape of

Puniben - wife of Siska Babariya allegedly committed on 20th March, 1993 in the wee hours of night on Survey No.213 situated opposite Pirana Tol Naka on Narol-Sarkhej Highway at Ahmedabad. The charge was also for destruction of evidence by burying the dead body of Siska Babariya. The accused pleaded not guilty to the charge and claimed to be tried.

2.6 The prosecution led evidence. Thereafter, the statement of the accused under Section 313 was recorded followed by arguments of both the sides. After the arguments were offered, an application (Exh.39) was moved by the prosecution on 6th July, 1995 stating *inter alia* that on going through the papers, it is found that in the charge (Exh.1), name of murdered person is mentioned as Siska - husband of Munnibai. However, in fact, as per the prosecution case, the name of the murdered person was disclosed at the initial stage as Bansilal - husband of Munnibai and not Siska - husband of Munnibai and it is nowhere the suggestion that Siska was residing at the scene of offence alongwith Munnibai and, therefore, name of Siska in the charge (Exh.1) is a mistake or a typographical error and it should have been Bansilal. It is, therefore, necessary to amend and/or alter the charge. Ultimately, it was prayed that name of Bansilal be mentioned instead of Siska as murdered person in Exh.1. The defense put an endorsement of 'no objection' and endorsed further that no witness is required to be recalled and, therefore, the Trial Court passed the following

order:

"By consent, the application is allowed. Charge (Exh.1) is amended accordingly."

2.7 Pursuant to that order, Exh.1 came to be amended and in place of Siska Babariya, name of Bansilal Makwana was replaced. Plea of the accused was recorded in respect of the altered charge and he pleaded not guilty.

3. Subsequent to the above development, the Trial Court passed the judgment and order impugned in the appeal on 27th July, 1995 and recorded conviction for murder of Homo and rape of Puniben (p.w.2) and hence, this appeal.

4. We have heard learned advocate Mr. K.R. Raval for the appellant and learned APP Mr. Bhate for the respondents. We have perused the record and proceedings.

5. Learned advocate Mr. Raval submitted that the Trial Court committed an error in appreciating the evidence and in giving weightage to the deposition of sole witness not supported by any independent evidence. Mr. Raval submitted that the prosecution itself does not seem to be sure about its case and, therefore, the Trial Court ought not to have recorded conviction.

5.1 Mr. Raval submitted that as per the F.I.R., the deceased was Bansilal and his wife was Munniben and Munniben and the accused collectively committed murder of Bansilal. The dead body has been identified by the employer as of Bansilal. Whereabouts of Munniben and the accused were not known. Somehow, the investigating agency has been able to find out Lakhaji Babariya who claims that the dead body was of his son Homo and that Puniben is wife of his brother Siska. According to the prosecution, Puniben and Munniben are same person although there is no specific evidence led by the prosecution. But even if that is accepted, Mr. Raval submitted that relationship between Puniben and Homo would be that of aunt and nephew respectively and she could not have branded Homo as her husband.

5.2 In fact, Puniben in her deposition (Exh.20) has come out with a case that her husband was Sumo who was murdered by the accused.

5.3 With all these evidence on record, the charge of murder of Siska by the accused was altered to charge of murder of Bansilal by the accused, at the instance of the prosecution. Mr. Raval, therefore, submitted that the charge against the appellant has not been that of murder of Homo - son of Lakhaji Babariya. It was initially for murder of Siska and then murder of Bansilal, both of whom are found alive by the prosecution, as can be seen from the evidence of p.w.9 – Karsanbhai Jivanbhai Jadav

and Investigating Officer – Abdulrehmankhan Munshi. Puniben who claims to be eye-witness, in her deposition, states that the accused committed murder of Sumo – her husband. The dead body which was found at the place has been identified by the first informant to be that of Bansilal whereas Bansilal is found alive by the police witness - Karsanbhai Jadav whereas the same dead body has been identified by Lakhaji as that of his son Homo.

5.4 There is absolutely no evidence except bare words of police witness - Karsanbhai Jivanbhai Jadav (Exh.32) that Harising Joitasing and Ramsing Dola have identified one photograph of a lady and a gentleman as that of Puniben and Homo - son of Lakhaji Babariya. These two witnesses have not been examined. There is absolutely no evidence to show that Munnibai and Puniben are the names of same person.

5.5 Mr. Raval, therefore, submitted that the prosecution case itself is not clear as to whose dead body was found and as to who was the person murdered.

5.6 Mr. Raval also submitted that the prosecution case as regards murder depends mainly on testimony of Puniben who is projected as the solitary eye-witness to the incident. She is projected as Puniben @ Munniben who was staying at the place where the incident occurred. According to Puniben, her husband was Sumo whereas as per the prosecution

evidence, her husband was Siska - uncle of Homo and as such, she has not come out with a true story. It is a question whether Munnibai is Puniben and whether Puniben saw the incident. Puniben would not have identified Homo as her husband if her husband's name was Siska. Mr. Raval submitted that the evidence of Puniben cannot be given any credence when she is coming out with such a story where she replaces Homo as her husband in place of her real husband Siska.

5.7 Mr. Raval submitted that conduct of Puniben is also strange. She says that she was sleeping with Sumo on a heap of sand at the site and on the accused assaulting her husband, she rushed into the room. That room is occupied by the accused. Ordinarily, even if a lady proposes to escape, she would escape to a place where the assailant may not have any control. This conduct on her part is unnatural. Mr. Raval submitted further that thereafter, she remained in the room till the accused allegedly digs a pit and buries the dead body. She does not make any attempt to resist or escape and thereafter, she claims that she was raped twice but there are no indications of any resistance on her part. Mr. Raval submitted further that even subsequent conduct is strange. The witness passes through the Tol Naka which is a populated area but does not take any action and then goes to Narol Chowkdi where there is a police chowki. There also, she does not seek any help nor does she lodge any complaint but goes to her hometown in Rajasthan. There again, it has come in evidence that

she, instead of going to her matrimonial home, goes to her parental home. After reaching parental home also, she does not disclose this fact to anyone for a period of about 8 days till she is contacted by police. This conduct coupled with her oral version about murder of her husband should render her deposition incredible for accepting her case about rape, in absence of any other supportive material. Mr. Raval, therefore, submitted that conviction for murder as well as rape is ill-founded and, therefore, the appeal may be allowed.

6. Learned APP Mr. Bhate has opposed this appeal. According to him, the deceased was initially identified as Bansilal but in fact, he was Homo, as identified by his father Lakhaji Babariya. The possibility that Homo adopted name of Bansilal cannot be ruled out. The fact remains that dead body of Homo is found out. The conduct of the appellant of abscondance is very relevant. He otherwise had no reason to abscond. Mr. Bhate submitted further that there is no reason for Puniben to falsely implicate the accused. She has no reason to make an allegation which would damage her image and would have to suffer a social setback. Mr. Bhate, therefore, submitted that the Trial Court has considered all the relevant aspects and has recorded conviction which does not require any interference in exercise of appellate powers. He, therefore, submitted that the appeal may be dismissed.

7. Having gone through the record and proceedings, we find that evidence of the prosecutrix is of prime importance. She is examined at Exh.20 as p.w.2. In her deposition, she identifies the accused. She says that when she and her husband Sumo were working as labourers near Narol Tol Naka on the construction site of a hotel of a Mohammedan, the accused was staying in a room whereas she and her husband used to sleep outside. The accused was working as a watchman.

7.1 She states that on the day of the incident at about 4.00 a.m. while she was sleeping with her husband Sumo on a heap of sand, the accused came and inflicted 'dharia' blows on her husband Sumo. She was scared on noticing the first blow given with a 'dharia' on her husband and ran into the room in which the accused was staying. According to her, her husband died because of 'dharia' injuries caused by the accused. Thereafter, the accused dug out a pit and buried the dead body and then came to the room and committed rape on her twice and thereafter, he locked her into the room and went away. She says that she made use of a spade and made a hole in the wall and escaped. She went up to Narol Chowkdi on feet and then went to her hometown in a bus. She had 50 rupees with her. After she went home, police came to her and recorded her statement.

7.2 During cross-examination, she says that the accused was working as a watchman only and was not

engaged in any labour work. She says that on hearing shouts of her husband Sumo that she woke up. She admits that there was no light at the place of incident. She denies that the dead body was that of Bansilal and not Sumo. She states that she did resist her rape but she admits that there were no physical injuries caused to her. She admits that she had not stated before police that the accused had locked her into the room but she had stated that the accused had confined her to the room and then went away. Likewise, she also admits that she had not stated before police that she had used a spade and after making a hole in the wall she had escaped but she had stated that she had removed bricks and then escaped. She states during cross-examination that after going to her hometown, she had not stated to anyone about the incident. She states that she had gone to her parental house at Lohariya and not to her matrimonial house at Muniya Kota.

8. Next important witness is Lakhaji Babariya (Exh.31). He says that Homo was his son. He was initially working at Vadodara and then had shifted to Ahmedabad. He says that the news of death of his son Homo was given by the police. The police brought him to Ahmedabad for identification of dead body. The dead body was shown to him and he found the same to be of his son Homo. The police had shown to him a photograph which was of Homo and, therefore, he came to Ahmedabad. According to the witness, Siska is his brother and his wife is Puniben. He says that

Puniben had gone to Ahmedabad with Homo. He says that when he came to Ahmedabad for identification of dead body, Puniben was with him. He says that he does not know any one. He states that when he came for identification of dead body, his brother Siska was not with him. Homo had shifted to Ahmedabad 15 days prior to the incident. He denies the suggestion that the dead body was not that of Homo but was that of Bansilal.

9. Next important witness is Karsanbhai Jivanbhai Jadav. He is a P.S.I. who was deputed to investigate the case and make enquiries about Munniben. He says that he was given a photograph of a couple – a male and a female. He says that he went to Chhota Dungara and on 28th March, 1993, he found Bansilal Nanuram Makwana alive. He recorded his statement. He showed the photograph to him but Bansilal could not identify. He says that he went to Kansaarwadi and showed the said photograph of the couple to Harising Joitaji and Ramsing Dola who identified the male in the photograph as Homo - son of Lakhaji Babariya and the female in the photograph as Puniben - aunt of Homo. He, therefore, went to Muniya Kota and met Lakhaji who also identified the male in the photograph as his son Homo. He says that he also found out Puniben. He says that he brought Lakhaji Babariya and Puniben to Ahmedabad and handed them over to Vatva police.

10. Witness Maknalala Mohaniya is examined at

Exh.25. He identifies the accused. He says that he has a son Rasool who is brother-in-law of the accused. This witness says nothing about the incident and is, therefore, declared hostile. In cross-examination to the Public Prosecutor, he denies that the accused had made an extra-judicial confession before him.

10.1 Investigating Officer - Abdulrehmankhan Munshi is examined at Exh.34. He states that he, after taking the charge of investigation, had deputed P.S.I. Gohil to find out Munniben - wife of Bansilal and the accused Jyoti Virsing. While he was recording statement and investigating, P.S.I. Gohil brought before him accused Jyoti Virsing whom he arrested after interrogation and drawing a panchnama. He says that he sent accused - Jyoti Virsing and Bai Munni for a medical examination. He says that Munnibai's name was revealed initially at Ahmedabad but it was found during investigation at Rajasthan that her correct name was Puniben who is wife of Siska Babariya and Siska is brother of Lakhaji Babariya. The dead body was that of Homo - son of Lakhaji Babariya whose name was initially disclosed as Bansilal but, in fact, his correct name was Homo and not Bansilal and he deposes about disclosure of 'dharia' by the accused. He proves the fact stated by Maknalala in his police statement which Maknalala has denied to have stated. He admits that in the F.I.R., Munnibai - wife of Bansilal Makwana is indicated as accused no.2. He also admits that while

filing chargesheet against the accused, no report under Section 169 of CrPC in respect of Munnibai was filed. He states that during investigation, it was found that Munnibai was not an accused but a victim of rape and, therefore, she was shown as a witness in the chargesheet. He admits that statement of Bansilal Nanuram Makwana was recorded during the course of investigation but has not been cited as a witness in the chargesheet. He also admits that no statement of Munnibai has ever been recorded during the course of investigation. He denies the suggestion that the person working as a watchman at the site of the first informant was Bansilal and not the accused. He denies the suggestion that Bansilal and his wife Munnibai were staying at the site.

11. Apart from the above important evidence, there is medical evidence in form of post-mortem notes, the medical certificate of Puniben and the accused and deposition of Dr. Nayankumar Natwarlal Parikh who had performed the post-mortem. We find that the medical examination of the prosecutrix and the accused has not revealed existence of any injury or indications of a forcible intercourse.

11.1 The medical evidence so far as the death is concerned is that the dead body was that of one Bansilal and three injuries were found on his head. The injuries were found to be sufficient in ordinary course of nature to cause death individually as well as collectively and were possible with a 'dharia' or

an axe. It has also emerged from the medical evidence that the dead body was in a badly decomposed condition and was badly stinking. Maggots had developed on a large scale.

12. We have no hesitation in holding that the person whose dead body was found and post-mortem was performed met with a homicidal death. This aspect is not seriously disputed either and, therefore, we conclude that the person whose dead body was found and post-mortem was performed met with a homicidal death.

13. The question that arises for consideration is whose dead body it was. Initially, it was indicated that it was the dead body of Bansilal and it has been identified as such by the first informant – Abbasbhai Gulambhai Momin but at a later stage, the dead body is identified by Lakhaji Babariya as that of Homo - his son. It has also come in evidence that Bansilal Makwana was found alive by P.S.I. Jadav during course of investigation and his statement has been recorded. The First Information Report, therefore, itself is founded on doubtful facts.

13.1 Against the evidence of Lakhaji Babariya that the dead body was of his son Homo, there is evidence of Puniben who poses to be an eye-witness. According to her, her husband Sumo was done to death on the fateful night by the accused and then the dead body was buried. Therefore, the dead body, being

that of Sumo, cannot be ruled out. It has come in evidence that when Lakhaji Babariya was brought to Ahmedabad for identification of dead body, Puniben was also brought and at that time, no identification is carried out by her. She insists till she deposes in the court that her husband Sumo was done to death.

13.2 It is strange that Puniben is identified by Lakhaji Babariya as wife of Siska, his brother. Lakhaji also says that Puniben and his son Homo had gone to Ahmedabad together for work. Therefore, relationship between Puniben and Homo would be that of aunt and nephew and there is no scope for mistaking a nephew as husband. Not only that, according to Puniben, name of her husband is Sumo and not Sisko. No clarification in this regard is coming on record.

13.3 Barring a statement that it was revealed during the course of investigation that Puniben and Munniben are names of same person, no such evidence is led. It is not even clarified in deposition of Puniben that she is also known as Munniben whereas it has come in evidence that it was Munniben who was staying at the site with Bansilal as his wife when the incident occurred. In our opinion, no credence can be given to the prosecution evidence in form of deposition of Puniben who claims to be an eye-witness and if that piece of evidence is eliminated, there is no evidence worth a name to connect the appellant with the crime. Of course, the first informant says

that the accused was engaged by him as a watchman and the accused was working as such around the time of the incident and that after the incident, the accused was not found but this abscondance in isolation, would be only one of the circumstances that may be considered against him and cannot be considered as a circumstance to prove his involvement in the offence.

14. It is also worth a note that despite this evidence on record that the dead body was identified by Lakhaji Babariya as that of his son Homo and despite the fact that p.w.9 - Karsanbhai Jadav found Bansilal alive during the course of investigation, the prosecution has come out with an application (Exh.39) for altering the charge for murder of Bansilal instead of Sisko. Differently put, the charge against the accused is that of murdering Bansilal and that Bansilal is found alive by Karsan Jivan Jadav who has also recorded his statement and no conviction, therefore, could have been recorded by the Trial Court for murder of Homo for which there was not even a charge and for whose murder, there is no evidence except identification of the dead body. Puniben identifies the accused but asserts murder of Sumo and not Homo. She could not have mistaken Homo – her nephew for her husband nor she could have mistaken Sumo for Sisko – her husband. The entire prosecution story, therefore, is inconsistent, mysterious, incredible and unreliable so far as murder is concerned and in our considered opinion, the Trial Court committed error in recording

conviction.

14.1 Before switching over to considering the question about rape, we may hasten to act that an evidence in form of extra-judicial confession before Maknalala was collected by the investigating agency and Maknalala has been examined at Exh.25. He has not supported the prosecution case and has not deposed about any extra-judicial confession being made. He was, therefore, declared hostile. He asserts that no such extra-judicial confession was made before him. This extra-judicial confession is sought to be proved through deposition of Investigating Officer – Abdulrehmankhan Munshi (Exh.34) who states that the statement of Maknalala was recorded by P.S.I. Gohil (who is not examined and who is not even shown as an Investigating Officer) wherein Maknalala has stated that “Yesterday on 28th March, 1993, at about 11.00 a.m. (he) came to us and told us that (he) was staying at Ahmedabad Narol-Sarkhej Road near Pirana Tol Naka where one Bansilal and his wife Munniben used to come to sleep during the night and on 20th March, 1993, he had a quarrel with Bansilal at night and had, therefore, committed murder and he has absconded after burying the dead body.” This contradiction, sought to be proved through deposition of Investigating Officer, does not reveal as to who was the person who made this disclosure before Maknalala and even if it is accepted, that is in respect of Bansilal who is found to be alive and, therefore, this piece of extra-

judicial confession is of no virtue to the prosecution.

15. Now, coming to the question as to the offence of rape, it is sought to be proved through deposition of Puniben (p.w.2) (Exh.20). This is the solitary piece of evidence led by the prosecution in this regard. The medical evidence led by the prosecution is not indicative of any physical injuries on either the accused or the prosecutrix. There is absence of any semen or sperm and there is absence of any other indications of rape. We, therefore, have to examine whether conviction of the appellant, founded solely on deposition of Puniben, can be upheld or not.

16. In this regard, we may refer to the decision of the Apex Court in **RAMDAS AND OTHERS vs. STATE OF MAHARASHTRA [(2007) 1 SCC (Cri.) 546]** where it is observed that a conviction in case of rape can be based solely on the testimony of the prosecutrix but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity, if the evidence of the prosecutrix is of such quality that may be sufficient to sustain an order of conviction solely on the basis of her testimony. Keeping the above principle in mind, if we examine the evidence of the prosecution, we find that according to Puniben, her husband Sumo was murdered by the accused whereas there is evidence to show that Siska is the husband of Puniben and not

Sumo. There is no evidence to show who Sumo was. There is no evidence to show that the dead body was of Sumo. On the contrary, there is evidence to show that the dead body which was found was that of Homo who happens to the nephew of the prosecutrix and, therefore, when the prosecutrix says that her husband Sumo was murdered, it is far from a reliable truth. We do not know who Sumo was. There is no evidence in this regard at all. Homo is her nephew and her husband is Sisko. Therefore, in this regard, the prosecutrix is not coming out with truth and, therefore, we have not believed her version so far as case of murder is concerned. Both the incidents have occurred in quick succession and can be regarded as having occurred in same transaction.

16.1 Apart from the above aspects, the conduct of the prosecutrix also throws doubt on her truthfulness. According to her, when the accused attacked Sumo, she ran into the room which was occupied by the accused. Ordinarily, in such eventuality, a lady would try to run away from the place rather than going into a room. It is not her case that she locked the room from inside to protect herself from likely assault by the accused. Thereafter, she stays in the room and watches the accused digging a pit and burying her husband. Then she claims that she was raped twice in support of which there is no other supportive evidence.

16.1.1 After the incident also, she goes to Narol Chowkdi which is at a long distance. She passes by the Tol Naka but does not take any action. Even after

reaching Narol Chowkdi, she does not complain to the police at the Police Chowki and then she catches a bus and goes to her parental house rather than her matrimonial house.

16.1.2 Even after reaching the parental house, she does not disclose this aspect to any one for a long period of 8 days till she is contacted by police.

16.1.3 When she is brought back to Ahmedabad alongwith p.w.8 – Lakhaji and Lakhaji identifies the dead body as that of his son Homo, she does not say anything on this aspect. Under the circumstances, we are of a view that her conduct is also not natural.

16.2 The prosecution has miserably failed to prove that Puniben (p.w.2) is the same lady as Munniben who was staying at the place of occurrence alongwith Bansilal with whose death the accused was charged.

16.3 The deposition of Puniben is not found to be of a sterling quality, on sole testimony of whose, a conviction can be founded or confirmed. The witness has come out with story which is inconsistent with the prosecution case and does not appear to be truthful. We are afraid, a conviction founded on such evidence, if confirmed, would mar the ends of justice rather than meeting the ends of justice.

17. It is true that a lady ordinarily would not involve herself or the accused with an offence which would affect her image, her character and her social

life. But looking to the way in which the investigation has proceeded and the way in which the entire evidence is collected, we are of the view that conviction of accused for an offence of rape cannot be sustained solely on the deposition of p.w.2. The prosecution has not led any evidence to show as to what led the P.S.I. Jadav (Exh.32) to go to Kansarvadi, a remote village of Rajasthan. Witness Harising Joitaji & Ramsing Dola who recognised & identified photograph allegedly of Munniben as that of Puniben have not been examined as witnesses.

17.1 The prosecution story, to be accepted, requires many presumptions, assumptions & surmises to be drawn in absence of any foundation.

18. If the conviction under Section 302 of I.P.C. cannot be sustained, there is no question of sustaining conviction under Section 201 of I.P.C. and, therefore, the appeal, as a whole, merits acceptance.

19. Accordingly, the appeal is allowed. The judgment and order dated 27th July, 1995 rendered by learned Additional Principal Judge, City Sessions Court No.2, Ahmedabad in Sessions Case No.213 of 1993 is hereby set aside.

20. We notice that the accused has been released on bail by virtue of an order passed on 7th February, 1996 by this court. Under the circumstances, his bail bond shall stand cancelled.

(A.L. Dave, J.)

(Sharad D. Dave, J.)

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